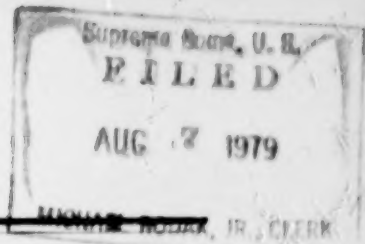


No. 78-1911



In the Supreme Court of the United States

OCTOBER TERM, 1978

ROBERT L. GUYLER CO., PETITIONER

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF CLAIMS**

**BRIEF FOR THE UNITED STATES
IN OPPOSITION**

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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OPINIONS BELOW

The opinion of the Court of Claims (Pet. App. 30-42) is reported at 593 F. 2d 406. The opinion of the Armed Services Board of Contract Appeals (Pet. App. 20-26) is reported at 76-1 BCA para. 11,893. The Board's opinion on motion for reconsideration (Pet. App. 27-29) is reported at 76-2 BCA para. 12,061.

JURISDICTION

The judgment of the Court of Claims was entered on February 21, 1979, and a motion for rehearing was denied on April 6, 1979 (Pet. App. 43). The petition for a writ of certiorari was filed on June 25, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1255.

QUESTION PRESENTED

Whether the Court of Claims erred in holding that the Armed Services Board of Contract Appeals' denial of petitioner's claim for an equitable adjustment for costs incurred in performing a government contract was not arbitrary, capricious, unsupported by substantial evidence, or erroneous as a matter of law.

STATEMENT

In this case, petitioner seeks an equitable adjustment for the costs of providing 400 dishwashers in military housing being renovated at Fort Bragg, North Carolina (Pet. App. 20, 31). The Armed Services Board of Contract Appeals denied petitioner's claim and upon appeal the Court of Claims sustained the Board's determination.

In March 1974 the Department of the Army issued an Invitation for Bids (IFB) for renovating military housing at Fort Bragg. The IFB specified that the government would furnish the dishwashers to be installed. Thereafter, the IFB was amended by the addition of two subparagraphs to provide that the contractor would furnish the dishwashers and by the corresponding deletion of two provisions that had obligated the government to supply the dishwashers. However, the amendment failed to change the "Scope of Work" clause, which stated that furnishing dishwashers was not included in work of the contractor (Pet. App. 20-22, 31-34).

Petitioner is a contractor that was invited to bid on the renovation project. Both petitioner and McCarty Corporation, petitioner's subcontractor for the mechanical (including plumbing) work, were experienced contractors that had frequently worked together on similar renovation projects. Petitioner and McCarty were provided with the IFB and the amendment. Petitioner did not read the

amendment, relying instead on McCarty to discover any changes; McCarty did read the amendment but did not recognize the added requirement that the contractor rather than the government would provide the dishwashers (Pet. App. 22, 34-35).

Petitioner subsequently bid on and was awarded the \$3 million prime contract for the renovation, and a \$1.1 million subcontract for the mechanical work was awarded by petitioner to McCarty. Neither petitioner's nor McCarty's bids reflected the \$83,000 cost of the dishwashers. McCarty, as petitioner's subcontractor, was ultimately required by the government to furnish the dishwashers, which it did under protest (Pet. App. 23, 35-36). McCarty then made a claim (through petitioner) to the contracting officer for an equitable adjustment for the cost of the dishwashers. From the contracting officer's adverse determination, petitioner appealed to the Armed Services Board of Contract Appeals which denied the claim initially (*id.* at 20-26) and upon reconsideration (*id.* at 27-29).

Petitioner appealed the Board's decision to the Court of Claims for review under the standards of the Wunderlich Act, 41 U.S.C. 321-322. Petitioner contended that the administrative denial of the equitable adjustment was arbitrary, capricious, unsupported by substantial evidence, and erroneous as a matter of law. The court adopted the recommended decision of its trial judge that the Board's denial of the claim be upheld and the petition be dismissed (Pet. App. 30-42).

ARGUMENT

Petitioner's principal argument is that the IFB was ambiguous on the responsibility of the contractor to furnish the specified dishwashers and that this ambiguity should be construed against the government as the drafter

of the IFB and should entitle petitioner to an equitable adjustment for the costs incurred in supplying the dishwashers. Petitioner also asserts that the Court of Claims' decision constitutes an unconstitutional exercise of legislative power by the judiciary, violates 10 U.S.C. 2305(b), conflicts with the Armed Services Procurement Regulations, and disregards established law governing federal contracts. Notwithstanding these arguments, the Court of Claims' decision is correct, and none of petitioner's contentions warrants review by this Court.

1. The Court of Claims reviewed this case under the standards of the Wunderlich Act, 41 U.S.C. 321-322. It accordingly gave finality to the factual findings of the Armed Services Board of Contract Appeals, which findings the court found not to be arbitrary, capricious, or unsupported by substantial evidence (Pet. App. 38). 41 U.S.C. 321; *United States v. Carlo Bianchi & Co.*, 373 U.S. 709 (1963); *Jefferson Construction Co. v. United States*, 364 F. 2d 420 (Ct. Cl. 1966), cert. denied, 386 U.S. 914 (1967). On the basis of the undisputed facts, both the Board and the court concluded that there was an obvious and glaring conflict between the section of the amended IFB which stated that the furnishing of dishwashers was not work included in the contract and the sections which plainly stated that the contractor should furnish the dishwashers (Pet. App. 24-25, 39). Petitioner either was or should have been aware of this inconsistency (*id.* at 25, 39).

In these circumstances, the law is clear that a bidder who stands idly by cannot later invoke the doctrines that ambiguities in government contracts are resolved against the drafter or that the contract is null and void for vagueness, want of particularity, or lack of a meeting of the minds. To the contrary, when, as here, a bidder is on

notice of an inconsistency on the face of the contract, he is affirmatively obligated to inquire of the government and seek the necessary clarification. See, e.g., *S.O.G. of Arkansas v. United States*, 546 F. 2d 367 (Ct. Cl. 1976), and cases cited therein; *Beacon Construction Co. v. United States*, 314 F. 2d 501 (Ct. Cl. 1963). This established principle acts as "a major device of preventive hygiene; it is designed to avoid just such post-award disputes as this by encouraging contractors to seek clarification before anyone is legally bound." *S.O.G. of Arkansas v. United States*, *supra*, 546 F. 2d at 370-371. See also *Beacon Construction Co. v. United States*, *supra*, 314 F. 2d at 504. Accordingly, in submitting its bid without bringing the patent discrepancy to the attention of the contracting officer, petitioner offered its bid at its own risk and was not entitled to an equitable adjustment. *Dale Ingram v. United States*, 475 F. 2d 1177 (Ct. Cl. 1973); *Beacon Construction Co. v. United States*, *supra*.

2. Petitioner's contentions that the IFB specifications regarding the dishwashers were inadequate to satisfy 10 U.S.C. 2305(b), the Armed Services Procurement Regulations, and the principles of contract law covering federal procurements, are unavailing. This case does not present a question concerning the adequacy of compliance with the terms of a contract, and the government has not taken the position that the dishwashers failed to meet contract specifications (Pet. App. 40). Rather, the only issue is whether respondent is entitled to compensation from the government (in the form of an equitable adjustment) because of an asserted ambiguity on the basic question of which party was to furnish the dishwashers. Thus, petitioner's assertion that the specifications were

inadequate is immaterial here and cannot serve to relieve petitioner altogether of its obligations under the contract.¹

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. McCREE, JR.
Solicitor General

AUGUST 1979

¹Moreover, the court below correctly found that petitioner did not demonstrate a violation of any applicable statute, procurement regulation, or principle of contract law (Pet. App. 40-42).